-1497

APR 5 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1973

No. 73-1497

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 21,
Petitioner,

v.

REYNOLDS METALS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK POZZI
RAYMOND J. CONBOY
808 Standard Plaza Building
Portland, Oregon 97204
Attorneys for Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-74

SUBJECT INDEX

	Page
Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit	1
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes	4
Statement of the Case	7
Reasons for Granting the Writ	22
The Court of Appeals erred in holding that the case was moot	23
The Court of Appeals erred in deciding the case on the merits after holding that the controversy was moot	28
The Findings and Judgment of the District Court were based upon substantial evidence, and the Court of Appeals erred in setting them aside	29
Conclusion	34

TABLE OF AUTHORITIES

Page

Cases

Fibreboard Paper Products Corporation v. *National Labor Relations Board*, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964) 22, 24, 25, 28

Flight Engineers International Association, AFL-CIO TWA Chapter v. *Trans World Airlines, Inc.*, 305 F.2d 675 (C.A. 8, 1962) 23, 29

International Brotherhood of Teamsters v. *Deaton Truck Line, Inc.*, 307 F.2d 748 (C.A. 5, 1962) 23, 29

International Brotherhood of Teamsters v. *Zantop Air Transport Corp.*, 394 F.2d 36 (C.A. 6, 1968) 18, 23, 29

Local 8-6 v. *Missouri*, 361 U.S. 363, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960) 22, 29

McAllister v. *United States*, 348 U.S. 19, 75 S. Ct. 1944, 3 L. Ed. 2d 491 (1969) 23

NLRB v. *Northern California District Council of Hod Carriers and Common Laborers of America, AFL-CIO*, 389 F.2d 721 (C.A. 9, 1968) 25, 26

Pacific Maritime Association v. *International Longshoremen's & Warehousemen's Union*, 454 F.2d 262 (C.A. 9, 1971) 22, 26, 27, 28

Portland Webb Pressmen's Union v. *Oregonian Publishing Co.*, 286 F.2d 4 (C.A. 9, 1960) 24

Powell v. *McCormack*, 395 U.S. 416, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) 22, 28

Wirtz v. *Local Unions* 410, 410A, 410B *and* 410C, 366 F.2d 438 (C.A. 2, 1962) 22, 29

TABLE OF AUTHORITIES (Cont.)

Page

Statutes and Rules

Federal Rules of Civil Procedure, Rule 52(a) 6, 8, 23

Labor Management Relations Act, § 8(a)(5) 4, 22, 24, 25, 28

Labor Management Relations Act, § 8(d) 4, 22, 24, 25, 28

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2201 ..... 3, 6, 7

29 U.S.C. § 158(a) 4, 22, 24

29 U.S.C. § 158(b) 4

29 U.S.C. § 158(d) 4, 22, 24

29 U.S.C. § 185(a) 3, 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.....

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 21,
Petitioner,

v.

REYNOLDS METALS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 9, 1973.

OPINIONS BELOW

The Opinion of the United States District Court for the District of Oregon, filed on February 16, 1971, which has not been officially reported, is appended to this Petition as "Appendix E." The Judg-

ment of that Court, filed on April 7, 1971, is appended to this Petition as "Appendix D." An "Order Allowing Stay of Judgment During Appeal" signed and filed by the District Court on April 16, 1971, is appended to this petition as "Appendix C."

The Opinion of the United States Court of Appeals for the Ninth Circuit, filed November 9, 1973, and as yet unreported, is appended to this Petition as "Appendix B." The Judgment of the Court of Appeals, entered the same date, is appended to this Petition as "Appendix A."

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 9, 1973. On January 22, 1974, Justice William O. Douglas entered an order ". . . that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 8, 1974." The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

On November 25, 1966, Local 21 and Reynolds Metals Company entered into a "Memorandum of Understanding," a collective bargaining agreement subject to the Labor Management Relations Act, which Local 21 contends gave its members certain work at a Reynolds plant dock. Reynolds disagreed, and the

Union filed suit for declaratory relief in the United States District Court for the District of Oregon pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Labor Management Relations Act, 29 U.S.C. § 185(a). The District Court entered Findings and Judgment in favor of the Union, but stayed its Judgment pending appeal. The collective bargaining agreement contained a termination date of July 1, 1971, which was prior to oral argument before the Court of Appeals, but contained a provision that "this agreement shall be considered renewed from year to year hereafter unless either party shall have given written notice of its desire to modify or terminate this agreement at least 60 days prior to expiration date." This provision was added for purposes of compliance with the Labor Management Relations Act, 29 U.S.C. § 158 (d). The Union timely gave notice of reopening of the contract. The Court of Appeals nevertheless held, upon the suggestion of Reynolds Metals Company, that the appeal was moot because the contract had expired prior to oral argument, and after holding that the case was moot proceeded to reverse the Judgment of the District Court upon the merits on the ground that the Judgment was not supported by substantial evidence.

The following questions are presented:

(1) Is a dispute over the scope of coverage of a collective bargaining agreement rendered moot if the agreement has an expiration date earlier than the termination of the controversy, where there exists a

duty under Sections 8(a)(5) and (d) of the Labor Management Relations Act, continuing beyond the contract expiration date, to bargain collectively with respect to wages, hours and conditions of employment covered by the contract?

(2) Is it proper for a federal appellate court to hold, at the suggestion of the appellant, that a case is moot and thereafter proceed to determine the controversy on its merits in favor of the appellant; and

(3) When a United States District Court, acting upon substantial evidence in the record considered as a whole, construes an ambiguity in the terms of a collective bargaining agreement in favor of one of the parties, may a United States Court of Appeals set aside that determination because it disagrees with the District Court's decision?

STATUTES

Labor Management Relations Act, 29 U.S.C. § 158(a):

> "It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title."

Labor Management Relations Act, 29 U.S.C. § 158(b):

> "For the purposes of this section, to bargain collectively is the performance of the mutual ob-

ligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of the dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * * * *"

Labor Management Relations Act, 29 U.S.C. § 185(a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Declaratory Judgments Act, 28 U.S.C. § 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Federal Rules of Civil Procedure, Rule 52(a):

"In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its

conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 * * *. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *.

STATEMENT OF THE CASE

This was a declaratory proceeding for construction of a collective bargaining agreement. Jurisdiction of the District Court was predicated upon the Declaratory Judgments Act, 28 U.S.C. § 2201, and the Labor Management Relations Act, 29 U.S.C. § 185 (a).

On or about November 25, 1966, Local 21, Reynolds Metals Company and the Port of Longview executed a "Memorandum of Understanding" covering the work of discharging alumina ore from Reynolds' ocean-going vessels. This "Memorandum of Understanding" was added to, and became a part of, the "Working Agreement Between Port of Longview and International Longshoremen's and Warehousemen's Union, Local No. 21, 1966-1971" (Pl. Ex. 1, R. II, p. 52). In 1967, Reynolds began constructing a dock at its Longview, Washington plant which became operational in September, 1969 (R. III, pp. 203-210, 281). Local 21 claimed the work of discharging vessels at the plant dock under the "Memorandum of Understanding." Reynolds contended that the "Memorandum of Understanding" did not apply to the plant

dock and refused to hire members of the Union for that work.

On December 8, 1969, Local 21 filed a declaratory judgment proceeding against Reynolds in the United States District Court for the District of Oregon, seeking a declaration that Local 21 was entitled to the disputed work and damages for breach of the agreement. The case was tried without jury to the court, Honorable Alfred T. Goodwin, District Judge, on December 7 and 8, 1970. On February 16, 1971, Judge Goodwin filed a written opinion, containing findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure. The Court determined that Local 21 was entitled to the disputed work, but declined to award damages (Appendix E). Judgment was entered in accordance with the opinion, and on April 16, 1971, Judge Goodwin entered a stay order pending review on appeal (Appendix C).

Local 21 exercises jurisdiction over all longshoremen employed in Cowlitz County, Washington, and represents longshoremen employed on the docks at Longview in Cowlitz County (R. I, p. 73; R. II, p. 85). Reynolds Metals Company has a plant near Longview where aluminum ingots are manufactured from alumina ore. The alumina ore is brought to the plant by ocean-going vessels and by rail cars (R. I, p. 73).

Since at least 1961, Local 21 has had a collective bargaining agreement with the Port of Longview and at all material times has had all of the work and handled all of the cargo at the Port (R. II, p. 20; R. III, p. 171).

Prior to 1961 alumina ore destined for the Reynolds' Longview plant was transported across country by rail (R. III, p. 183). In April, 1961, Reynolds experimented with shipping alumina ore to Longview by cargo vessel (R. I, p. 74; R. II, p. 4; R. III, pp. 168-173). Even earlier than 1961, Reynolds had decided to establish regular movements of alumina ore to Longview by cargo vessels. The plan to use cargo vessels rather than rail lines could not be put into effect until the company was able to arrange for return cargoes from ports on the Pacific Ocean. These arrangements had been made by the early 1960's (R. I, p. 11; R. III, p. 185).

Two kinds of vessels were used to transport alumina ore to the Port of Longview; "self-unloaders," from which the ore is discharged by conveyor belts from the vessel into hoppers and storage facilities on the dock, and "crane-type" vessels. Crane-type vessels are unloaded with traveling clam-shell cranes mounted on the vessel (R. I, p. 74; R II, pp. 5, 6; R. III, pp. 188, 190, 237). Nearly all of the alumina ore ships unloading at the Port of Longview were crane-type vessels (R. I, p. 74; R. III, p. 188). In fact, from 1961 to 1965 only seven "self-unloader" vessels discharged cargo at the Port. During 1966 and 1967 no "self-unloader" vessels came to the Port of Longview. During each of the years 1968 and 1969, only one self-unloader discharged ore at the Port (R. III, p. 280).

In 1962, the Port of Longview built an additional facility for handling alumina ore vessels (R. II, p. 6).

In 1963, the Port contracted with Reynolds to perform services as a master stevedore in unloading alumina ore (R. II, pp. 111-113; Def. Ex. 51). Pursuant to collective bargaining agreements with the Port of Longview, members of Local 21 performed all of the stevedoring services for the Port including the discharge of alumina ore at the new port facility (R. II, p. 6; R. III, p. 115; R. I, pp. 73-74).

Local 21's collective bargaining agreement with the Port was to expire during 1966, apparently having the same expiration date as the coast-wide contract between the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association (an employers' association of shipping companies, master stevedores and wharfingers). Local 21's agreement with the Port of Longview was, however, an "independent" contract and the Local agreed to continue in force its bargaining agreement with the Port until a new Coast contract was signed, at which time the independent contract would be renegotiated (R. II, pp. 6, 7).

The situation during the summer of 1966 may therefore be summarized as follows: Reynolds was transporting alumina ore to its Longview plant by cargo vessel. All of these cargo vessels discharged at the Port of Longview, and the ore was transported to the plant by railroad cars. The Port of Longview had contracted as a master stevedore to discharge the alumina ore vessels, and the work of discharging was carried out by members of Local 21 pursuant to

a collective bargaining agreement between Local 21 and the Port. Local 21 had no contract with Reynolds. No self-unloading vessels came to the Port during 1966, and only one during 1965. All other alumina ore vessels arriving at the Port were of the crane-type.

At this time, Reynolds was planning the construction of a new dock at its Longview plant for the purpose of discharging "self-unloader" type vessels. Local 21 was aware of these plans and wanted the work at the plant dock (R. II, p. 14; R. III, pp. 251, 253).

With respect to the unloading of alumina ore, both Reynolds and Local 21 had certain objectives in view during 1966. Reynolds wanted a faster "turn-around" time on its ore vessels than the Port had been able to provide. Reynolds wanted the longshoremen to change their work rules to work three shifts on a back-to-back round-the-clock basis. The company was also dissatisfied with the operation of the cranes on its crane-type vessels and wanted a pool of a limited number of specially trained longshoremen crane operators. The company was unhappy with the performance of the walking bosses who were overseers of the Port's stevedoring operation. The walking bosses were not members of Local 21. Reynolds additionally wanted more favorable manning rules for cargo operations. All of these matters (with the exception of the walking boss problem, which Local 21 had no power to do anything about) would require changes in the collective bargaining agreement then in force between Local 21 and the Port of Longview (R. I, p. 74; R. II, pp. 10,

12, 117-120; Pl. Ex. 17; R. III, pp. 187-193, 235-242; Def. Ex. 52, 53).

Local 21 also had certain objectives. The longshoremen's experience with aluminum companies in the Pacific Northwest had been bad. Harvey Aluminum Company and Alcoa had been successful in avoiding the employment of longshoremen to unload ore vessels (R. II, p. 8; R. III, p. 165). Local 21 did not want this to happen in Longview (R. II, p. 8). In addition it was common knowledge that Reynolds would probably build a dock at its own plant, since the company was expanding its plant operation to triple the output of aluminum, and the existing railroad facilities between the Port and the plant could not handle the increase (R. II, pp. 7, 8; R. III, pp. 189-190). Local 21 knew that Reynolds was seriously considering the construction of a conveyor belt pier at the plant to unload self-unloader type vessels (R. II, pp. 26, 27; R. III, pp. 153, 189). Local 21 wanted to negotiate a collective bargaining agreement directly with Reynolds guaranteeing that members of Local 21 would have the work of unloading Reynolds' ore vessels (R. II, pp. 8, 9, 13, 14, 15).

Reynolds' desire to shorten the "turn-around" time of its ore vessels by changing the work rules in the collective bargaining agreements between Local 21 and the Port of Longview, and Local 21's interest in committing Reynolds to a collective bargaining agreement between the Union and Reynolds led to a series of meetings between the principals during the fall of

1966. On August 9, 1966 and on September 29, 1966, Reynolds' labor negotiators met with managing agents of the Port of Longview (R. II, pp. 116, 117; R. III, pp. 192-194; 238-242; Def. Ex. 52, 53; R. II, p. 3; R III, p. 249). On October 1, 1966, and again on October 28 and 31 and November 25 and 26, 1966, Reynolds' negotiators met with members of the Labor Relations Committee of Local 21 which culminated in a document entitled "Memorandum of Understanding Between Reynolds Metals Company Marine Division and ILWU Local 21" bearing the date November 25, 1966 (R. II, pp. 46, 47; Pl. Ex. 33; R. III, p. 157). The "Memorandum of Understanding" is appended to this petition as "Exhibit F."

This document was signed by representatives of Reynolds Metals Company, Local 21, and the Port of Longview. The Memorandum of Understanding gave to Reynolds most of the changes in work rules which it desired. These included a twenty-four hour, three shift back-to-back operation, and a pool of 27 specially trained crane operators. In addition, the Memorandum of Understanding called for "T-Manning" on self-unloading type vessels. The "T-Manning" provisions incorporated in the Memorandum of Understanding are drawn from the Pacific Coast Longshore Contract and provide that when new methods of operation are introduced, the employers have a right to put any manning they desire into effect, subject to final resolution through grievance procedures. Almost no self-unloading vessels were putting into the Port of Longview when the Memorandum of Understanding

was adopted. However, the Reynolds plant dock would be built solely to accommodate such vessels.

The Memorandum of Understanding contained no geographical limitations. It was not in terms limited to the work of unloading Reynolds' vessels at the Port dock, neither did it expressly include or exclude work at the proposed plant dock. The Memorandum in its generality covers all work between Local 21 and Reynolds, and unless it is construed to cover work at the plant dock, the agreement was without benefit or consideration for the longshoremen. All alumina ore arriving in vessels at Longview is discharged at the Port of Longview docks or at the Reynolds plant dock. When the Memorandum of Understanding was negotiated, the longshoremen already had all of the work at the Port of Longview dock pursuant to a collective bargaining agreement with the Port of Longview. As a witness for Local 21 testified, the Union "... had all of the work involved and there was no way that anybody could obtain any part of it" (R. II, p. 20).

There was no reason whatever why Local 21 should agree to the onerous changes proposed by Reynolds in hours, manning and working conditions unless the longshoremen were to receive a *quid pro quo*. The only inducement which Reynolds had to offer was a commitment for work at the proposed plant dock. The longshoremen made substantial concessions to Reynolds. They consented to a continuous 24-hour, three-shift back-to-back work operation. They consented to a pool of 27 trained crane operators to replace the 40 to 60 men who could regularly, and as a matter of right,

claim crane work on Reynolds' vessels. Unless the longshoremen had been promised the plant dock work, they surrendered these work rights for the "privilege of working through a lunch hour" (R. III, p. 221).

Negotiations for Reynolds were conducted by Capt. Peter Johnson, who was then Port Captain, (and is now Operating Manager), for Reynolds (R. III, pp. 191, 233-234). Three labor negotiators for Local 21 testified that they told Johnson or that Johnson knew the Memorandum of Understanding was intended to cover work at the plant dock, and that Johnson signed the memorandum with knowledge of the Union's position (R. II, pp. 157-159, 161; R. II, pp. 47, 71, 76, 93-95). Captain Johnson denied that the plant dock was discussed at his November 1966 discussions with the Union (R. III, pp. 263, 293) although the issue had arisen at each previous meeting. He was unable to produce memoranda of his November 25 and 26 meetings with the Union, although he kept copious notes of every other meeting, and these were produced in evidence (R. III, p. 288).

The foregoing is only a smattering of evidence produced during the lengthy trial from which the District Judge could have found that the "Memorandum of Understanding," when signed, was intended by both parties to cover work at the proposed Reynolds plant dock.

The Union membership ratified the "Memorandum of Understanding" (R. III, pp. 165, 166). In June, 1967, Reynolds arrived at a final decision to

construct a plant dock for the discharge of self-unloading vessels (R. III, pp. 203, 204). However, there had been ". . . a lot of preliminary work done" on the proposed plant dock in previous years (R. III, p. 204). Construction of the dock began in October 1967 (R. III, pp. 205, 209). Completed a year later, the dock was immediately damaged by fire. It was not repaired and restored to operation until 1969, and the first Reynolds' vessel put into the dock in September of that year (R. III, p. 210). Between September, 1969, and the date of trial, eight or nine vessels had been unloaded at the plant dock (R. III, pp. 210, 281).

When the first vessel arrived at the plant dock in September, 1969, Local 21 demanded the work of discharging the vessel, pursuant to the "Memorandum of Understanding." Reynolds refused, and since that time has used its aluminum workers to handle the dockside work of unloading, and the ship's crew to handle stevedore work aboard the vessels (R. III, pp. 142-144, 210, 211, 281).

This proceeding for a declaratory judgment followed.

Upon oral argument of this case before the United States Court of Appeals for the Ninth Circuit, counsel for Reynolds made, for the first time, a suggestion of mootness. Chief Judge Chambers, as presiding judge of the panel which heard the appeal, called for supplemental briefs from the parties limited to the issue of mootness.

The final paragraph of the "Memorandum of Understanding" of November 25, 1966 provides: "It is agreed that this agreement shall also become a part of the agreement between the ILWU, Local 21 and the Port of Longview who actually performs the work for Reynolds Metals Company." The purpose of this provision was twofold: Local 21 did not wish to disturb the existing master stevedore arrangement between the Port of Longview and Reynolds for stevedoring performed at the Port, and the membership of Local 21 wanted all collective bargaining agreements consolidated into one document so that the men did not have to carry more than one contract (R. II, pp. 9, 24, 39, 40, 54, 121-122).

The Port contract was renegotiated in 1967, and the "Memorandum of Understanding" of November 25, 1966 did in fact become a part of the "Working Agreement between Port of Longview and International Longshoremen's and Warehousemen's Union, Local 21, 1967-71" (Pl. Ex. 1, R. II, p. 52).

The Working Agreement contains the following provisions (Pl. Ex. 1, p. 29):

> "Section VIII. This agreement shall become effective this 6th day of June, 1967, and shall terminate on July 1, 1971, and shall be subject to reviews as set forth in the Pacific Coast Longshoremen's and Clerks' Agreements. *This agreement shall be considered renewed from year to year thereafter unless either party shall have given written notice of its desire to modify or terminate this agreement at least 60 days prior to expiration date.* Negotiations shall commence

at the request of any party hereto, ten days after the basic wage is set as provided in Section 1A and B hereof. Any portion hereof may be amended by mutual consent, but must be in writing, signed by all parties hereto." (Emphasis added.)

A suggestion of mootness often calls for the consideration of evidence not available at the time of trial. *International Brotherhood of Teamsters* v. *Zantop Air Transport Corp.*, 394 F.2d 36, 40 (C.A. 6, 1968). Accordingly, counsel for Local 21, by its "Supplemental Brief of Appellee in Opposition to Suggestion of Mootness" advised the United States Court of Appeals for the Ninth Circuit of the following facts:

Reynolds has never given the Port or Local 21 written or other notice of ". . . its desire to modify or terminate" the "Working Agreement." Reynolds takes the position that the "Working Agreement" does not apply to the plant dock.

On April 27, 1971, more than 60 days prior to the expiration date of the "Working Agreement," Mr. Frank Pozzi, attorney for Local 21, wrote to Reynolds Metals Company (with copies to the Port of Longview and other interested parties) as follows:

"Reynolds Metals Company,
Marine Division
P. O. Box 2311
Corpus Christi, Texas 78403

Gentlemen:

This law office represents Local 21 of the International Longshoremen's and Warehousemen's Union. On November 25, 1966, Reynolds Metals Company entered into a collective bargaining agreement with Local 21. On behalf of Local 21 and at its request, we hereby notify you that Local 21 proposes to modify the above agreement, such modification to become effective July 1, 1971.

Representatives of Local 21 hereby offer to meet and confer with representatives of Reynolds Metals Company for the purpose of negotiating modifications to consist of higher wages for members of Local 21, better working hours, improved conditions of employment, and improved rules and procedures governing union-management relations.

Please advise us when and where representatives of Reynolds Metals Company will be willing to meet with representatives of Local 21 to negotiate a modified contract as above requested.

Very truly yours,
/s/ FRANK POZZI"

On May 14, 1971, Mr. Fred R. Edney, General Attorney for Reynolds Metals Company, responded to this letter as follows:

"Frank Pozzi, Esq.
Pozzi, Wilson & Atchison
Suite 808 Standard Plaza
Portland, Oregon 97204

Dear Mr. Pozzi:

We have your letter of April 27, 1971. As you know, the question of whether a collective bargaining agreement was entered into between your client and this company is *sub judice*, being the subject of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit. We deny that such an agreement exists and as you know we have never employed members of your client at the Port of Longview or elsewhere.

The Port of Longview renders stevedoring services to us as an independent contractor. We are informed that a collective bargaining agreement (to which we are not a party) exists between your client and the Port and that such an agreement expires during the latter part of June, 1971. Obviously, modifications of that agreement which affect the services rendered to us or the cost thereof are of interest to us. If this is the agreement you wish to modify should all parties find it mutually satisfactory we will be glad to be of any assistance that we can and to appear in the proceedings at the parties' convenience.

Sincerely,

/s/ FRED R. EDNEY
General Attorney"

On May 19, 1971, Mr. Pozzi responded to Mr. Edney's letter as follows:

"Mr. Fred Edney
General Attorney
Reynolds Metals Company
Reynolds Metals Building
Richmond, Virginia 23218

Dear Mr. Edney:

We received your letter of May 14, 1971. We believe that your letter does not accurately describe the legal relationship which exists between Local 21 and Reynolds Metals Company.

However, in view of your willingness to negotiate, we suggest a meeting at the Miramar Motor Inn in Longview, Washington, between representatives of Local 21 and Reynolds Metals Company at 1:00 p.m. on Thursday, May 27, 1971.

Please advise us if the time and place is satisfactory.

Very truly yours,

/s/ FRANK POZZI"

Edney apparently did not respond to this letter. The meeting proposed by Mr. Pozzi never took place.

In addition to the above correspondence, counsel for Local 21 timely and simultaneously advised the Federal Mediation and Conciliation Service, 450 Golden Gate Avenue, Box 36007, San Francisco, California 94120, and Mr. C. W. Ramage, Supervisor, Industrial Relations Division, Department of Labor and Industries, General Administration Building, Olympia, Washington 98501, (the agency established to mediate labor disputes in the State of Washington),

that a dispute existed between Local 21 and Reynolds Metals Company with respect to the proposed modification of the Memorandum of Understanding of November 25, 1966.

REASONS FOR GRANTING THE WRIT

In holding that the controversy between the parties was moot, the United States Court of Appeals for the Ninth Circuit decided this case in a manner in apparent conflict with this Court's decision in *Fibreboard Paper Products Corporation* v. *National Labor Relations Board*, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964), and *Powell* v. *McCormack*, 395 U.S. 416, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969), as well as in conflict with the express provisions of Sections 8(a)(5) and 8(d) of the Labor Management Relations Act, 29 U.S.C. § 158(a)(5); 29 U.S.C. § 158(d). The decision of the Ninth Circuit is also in conflict with a decision of another panel of the Ninth Circuit, *Pacific Maritime Association* v. *International Longshoremen's & Warehousemen's Union*, 454 F.2d 262 (C.A. 9, 1971).

Furthermore, the action of the Circuit Court in reversing the judgment of the District Court on the merits after holding, at the suggestion of the appellant, that the case was moot, is at variance with the federal practice announced by this Court in *Local 8-6* v. *Missouri*, 361 U.S. 363, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960), and is in conflict with the decisions of other Circuit Courts of Appeal. *Wirtz* v. *Local Unions*

410, 410A, 410B *and* 410C, 366 F.2d 438 (C.A. 2, 1966); *International Brotherhood of Teamsters* v. *Zantop Air Transport Corp.*, 394 F.2d 36 (C.A. 6, 1968); *Flight Engineers International Association, AFL-CIO TWA Chapter* v. *Transworld Airlines, Inc.*, 305 F.2d 675 (C.A. 8, 1962); *International Brotherhood of Teamsters* v. *Deaton Truck Line, Inc.*, 307 F.2d 748 (C.A. 5, 1962).

Finally, the action of the Circuit Court in setting aside the findings and judgment of the District Court in violation of the "clearly erroneous" test of Rule 52 (a) of the Federal Rules of Civil Procedure, firmly embodied in a long series of decisions of this Court and other Federal Courts, *McAllister* v. *United States*, 348 U.S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20 (1954), so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals erred in holding that the case was moot.

This case was not moot at the time it was argued and decided by the Court of Appeals, as the summary of facts set forth above convincingly demonstrates. The "Memorandum of Understanding" executed by Reynolds, The Port of Longview, and Local 21 was incorporated in the "Working Agreement" between the Port and the Union. The "Working Agreement" had a termination date of July 1, 1971, but was to be "... considered renewed from year to year thereafter unless

either party shall have given written notice of any desire to modify or terminate this agreement at least 60 days prior to the expiration date." (Pl. Ex. 1, p. 29). Local 21, through its attorney's letter of April 27, 1971, gave timely notice of a proposal "to modify the . . . agreement." Reynolds' response, through its counsel's letter of May 14, 1971, was to "deny that such an agreement exists."

Under such circumstances, this lawsuit can scarcely be considered an effort by the parties to have the Ninth Circuit resolve a hypothetical or no longer meaningful dispute. Sections 8(a)(5) and 8(d) of the Labor Management Relations Act, 29 U.S.C. § 158 (a)(5) and 29 U.S.C. § 158 (d), require an employer to bargain with the representative of his employees at the conclusion of a contract term, provided that the contract has been reopened by the service of timely written notice under the provisions of 29 U.S.C. § 158 (d). Failure to bargain is an unfair labor practice. *Portland Webb Pressmen's Union* v. *Oregonian Publishing Co.*, 286 F.2d 4, 5, 9 (C.A. 9, 1960); *Fibreboard Paper Products Corporation* v. *NLRB*, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964). The strength of the policy requiring an employee to bargain collectively with respect to modification of a collective bargaining agreement at its termination date is well illustrated by *Fibreboard Paper Products* v. *NLRB*, supra. In *Fibreboard*, the employer refused to bargain with the Machinists' Union, as representative of certain janitorial employees, for modification of a contract upon its termination date, but instead

subcontracted the work out at the end of the contract term to an independent contractor whose employees were not represented by the Machinists. This Court affirmed a Board Order requiring the reinstatement of the Machinists' employees with back pay. In holding that the controversy between Local 21 and Reynolds was moot, the Ninth Circuit failed to give any effect to Sections 8(a)(5) and (d) or to *Fibreboard*, although called to the attention of that Court by the Supplemental Brief of Local 21.

If, as Local 21 contends and the District Court found, the "Memorandum of Understanding" of November 25, 1966, covers work at the Reynolds plant dock, then Local 21 represents those of its members who are entitled to perform stevedoring work at the plant dock and who have been deprived of that work by Reynolds' breach of contract. Local 21 made a timely request to Reynolds to reopen the contract for modification. That request imposed upon Reynolds the duty to bargain in good faith for modification of the agreement, assuming that the contract covered the work. If Reynolds arguably was protected by the stay order entered by the District Court from bargaining until disposition of the appeal by the Ninth Circuit, that protection would cease upon entry of judgment by the Court of Appeals in the event that Local 21's position was sustained. Local 21 would be free at that time to use peaceful picketing of the Reynolds' plant to bring economic pressure upon Reynolds for the negotiation of a new agreement. *NLRB* v. *Northern California District Council of Hod Car-*

riers and Common Laborers of America, AFL-CIO, 389 F.2d 721, 725 (C.A. 9, 1968).

A case is not moot where, as here, a determination on the merits will have direct, measurable consequences for the parties. In fact, another panel of the Ninth Circuit has held that a labor relations case is not moot where there is only a possibility or likelihood, rather than a certainty, that a decision will have an effect upon the future conduct of the parties.

In *Pacific Maritime Association* v. *International Longshoremen's and Warehousemen's Union*, 454 F.2d 262 (C.A. 9, 1971), the Union engaged in a work stoppage over an "option clause" relating to containerized cargo. When the Union went on strike, PMA invoked a binding arbitration clause of the collective bargaining agreement. The arbitrator issued an award in favor of PMA, but the Union and its members refused to comply with the award. PMA then commenced an action in federal court for confirmation of the award and a court order enforcing the award and restraining the strike action. The Union appealed from a judgment of the District Court in favor of PMA. The appeal came before the Ninth Circuit in the following posture:

> On the day the Union filed its opening brief * * * the *Sinclair* case [370 U.S. 195] was expressly overruled in *Boys Market Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 255, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970). The court held in *Boys Market*, that the Norris-LaGuardia Act does not bar the granting of injunctive re-

lief enforcing the obligation that a union undertook under a specifically enforceable agreement to to submit disputes to binding arbitration. At oral argument on this appeal, the Union did not undertake to distinguish *Boys Markets* from the case now before us. Instead, it urged this court to remand the cause to the district court for dismissal of the injunctive feature of the action as moot, inasmuch as the collective bargaining contract here in question expired under its own terms on July 1, 1971. PMA opposed this disposition of the cause." (454 F.2d at 263).

The Ninth Circuit held that the expiration of the collective bargaining agreement did not render the appeal moot, a position diametrically opposed to that taken by the panel of the Court which decided the case at bar. The Ninth Circuit held, in *Pacific Maritime Association:*

> "In our opinion, the expiration of the collective bargaining contract of 1966 does not make it absolutely clear that the jurisdictional issue may not arise again between these parties. They may enter into another collective bargaining agreement containing similar no-strike and binding arbitration clauses, and once again it may be alleged that the Union is violating those clauses and injunctive relief may be sought. It appears to us to be preferred judicial procedure to decide, now, the fully-presented jurisdictional question which could arise again under the hypothesized circumstances. * * *. (454 F.2d at 264.)

If the issues in *Pacific Maritime Association* v.

International Longshoremen's & Warehousemen's Union, supra, were viable when the case was argued before the Ninth Circuit, *a fortiori* the issues in the present case are not moot. In *Powell* v. *McCormack*, supra, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 491 (1969), this Court held:

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." (395 U.S. at 496.)

In holding that the controversy between Local 21 and Reynolds was moot, the Ninth Circuit thus disregarded this Court's decision in *Fibreboard* and *Powell*, as well as Sections 8(a)(5) and (d) of the Labor Management Relations Act, not to mention that Court's own decision in *Pacific Maritime Association* v. *International Longshoremen's and Warehousemen's Union*.

The Court of Appeals erred in deciding the case on the merits after holding that the controversy was moot.

After holding, at the sugegstion of Reynolds, that the case was moot, the Ninth Circuit proceeded to "decide" the case on the merits, holding that the findings made by the District Court were "clearly erroneous." The opinion concludes with a peculiar disposition:

> "Therefore, even if the case had not been rendered moot, this court must find for appellant on the merits and order that the decision of the district court be reversed." (Appendix B.)

This Court and several Circuit Courts of Appeal have held that once a case is rendered moot, it will not be decided on the merits. *Local 8-6* v. *Missouri*, 361 U.S. 363, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960); *Wirtz* v. *Local Unions* 410, 410A, 410B *and* 410C, 366 F.2d 438 (C.A. 2, 1966); *International Brotherhood of Teamsters* v. *Zantop Air Transport Corp.*, 394 F.2d 36 (C.A. 6, 1968); *Flight Engineers International Association, AFL-CIO, TWA Chapter* v. *Trans World Airlines, Inc.*, 305 F.2d 675 (C.A. 8, 1962); *International Brotherhood of Teamsters* v. *Deaton Truck Line, Inc.*, 307 F.2d 748 (C.A. 5, 1962).

The procedure adopted by this Court in *Local 8-6*, and by the decisions of the Circuit Courts of the Second, Fifth, Sixth and Eighth Circuits is to remand with directions to vacate the judgment of the District Court for mootness. The judgment in this case is an implausible hybrid of a judgment on the merits and a dismissal for mootness, and this Court should not permit it to stand.

The Findings and Judgment of the District Court were based upon substantial evidence, and the Court of Appeals erred in setting them aside.

The District Court correctly determined that the "Memorandum of Understanding" of November 25, 1966, was intended by Local 21 and by Reynolds to include work at the Reynolds plant dock, when constructed. The Memorandum, executed by Reynolds and by Local 21, as well as by the Port, contains no geographical limitations. It is broad enough to in-

clude all alumina longshoring operations performed by Local 21 for Reynolds. If strictly construed, the Memorandum of Understanding would include work at the plant dock, contrary to the opinion of the Ninth Circuit.

The "Memorandum of Understanding" is attached to this petition as Exhibit F. The Agreement provides for a 24 hour, three-shift, back-to-back operation. The Union agreed to let Reynolds train and maintain a list of 27 qualified crane operators, thereby excluding many otherwise qualified longshoremen from employment as crane operators on Reynolds' vessels. The Agreement set out manning scales for "crane-type vessels" and for "self-unloading" type vessels. The manning for the latter type of vessel was designated as "subject to the 'T' manning provisions as set forth in the M & M Sections 10.3(b), 10.4, and 15.2 of the Pacific Coast Longshore Agreement." The "T" manning provisions of the Pacific Coast Contract mean that when new methods of operation are introduced, the employers have a right to put any manning they desire into effect, subject to final resolution through grievance procedures. The provisions for self-unloading type vessels were added to the Memorandum of Understanding because no one could foresee the manning requirements for discharging cargo at the plant dock, which was not yet built (R. II, pp. 34, 35). "Self-unloader" vessels were rarely brought by Reynolds to the Port of Longview dock. In 1966 and 1967, no self-unloaders put in at the Port dock and during each of the years 1968 and 1969, only one self-un-

loader discharged at the Port. Construction of the plant dock began in June, 1967, although, because of fire, it was not put into operation until 1969 (R. III, pp. 209, 210).

Three representatives of the Labor Relations Committeee of Local 21 testified that the Reynolds negotiator, Capt. Peter Johnson, understood the purpose of the "T" manning provisions when they were added to the Memorandum of Understanding. Mr. Leo Coulombe testified that prior to the November 25, 1966, meeting, Mr. Donald Van Brunt, Chairman of the Labor Relations Committee, had drawn up the final draft of the "Memorandum of Understanding," showed it to the Labor Relations Committee and signed it before taking it to Capt. Johnson. Van Brunt presented the document to Johnson, Johnson said that he had no authority to agree to it and would have to talk to his superiors, and took the document away with him unsigned. Later he signed and returned it. The document was then signed by the other members of the Labor Relations Committee (R. II, pp. 157-159, 161). At the November 25th meeting Mr. Van Brunt told Johnson ". . . that the membership wanted this, referring to the draft and . . . they wanted this work to cover the new plant." (R. III, p. 158).

Van Brunt testified that he signed the Memorandum of Understanding in his office (R. II, p. 47), and that the "T" manning provision was in the draft which he presented to Johnson (R. II, p. 71). Van Brunt testified that he and Capt. Johnson both under-

stood that the provisions regarding the self-unloading vessels were to cover operations at the company's dock when it was built (R. II, p. 76). Van Brunt testified that "this is the understanding with which we put it in and the understanding with which we signed it and left the agreement and the understanding with which I presented it to the membership and to the area committee later for acceptance."

Another representative of the committee, Mr. Merle Grogan, recalled that the "Memorandum of Understanding" was already prepared at the time the Labor Relations Committee met with Capt. Johnson. "T" manning was discussed at this meeting and the purpose of the "T" manning provisions was to cover work at the new plant dock if and when constructed (R. II, pp. 93-95).

Capt. Johnson denied that the "Memorandum of Understanding" was to cover work at the plant dock and denied that jurisdiction over work at the proposed dock was mentioned at all during the November, 1966, discussions, although he admitted that Mr. Van Brunt had "continuously brought it up" in prior discussions (R. III, pp. 263, 293). Capt. Johnson was impeached by discrepancies between his testimony and that of a fellow employee of Reynolds, as well as by some gaps in his office records. Cross-examination of Capt. Johnson, elicited that he kept detailed memoranda of all meetings with Local 21, except the meetings of November 25 and November 26, 1966, at which the final "Memorandum of Understanding" was produced and adopted (R. III, p. 288).

In addition, Capt. Johnson was unable to explain the necessity for "T" manning provisions in the Memorandum of Understanding, except to say that Reynolds might make "some major modification to [the Port of Longview dock] and put in a more sophisticated type of receiving system." (R. III, pp. 269-272). Johnson conceded, however, that at the time the "Memorandum of Understanding" was executed, Reynolds was "not seriously" considering remodeling of the Port dock to bring in self-unloading vessels, and that no plans were ever drawn up to remodel the port dock (R. III, p. 287). He also virtually conceded that "T" manning would not have been of any use at the Port dock unless the rail facilities between the Port and plant were also remodeled to handle increased ore shipments (R. III, p. 290).

Furthermore, the history of these negotiations and the circumstances of the parties point to a conclusion that the Memorandum of Understanding was intended to cover the work at the plant dock. Unless the Memorandum of Understanding covered work at the plant dock, it was, as pointed out earlier in this Petition, without benefit or consideration to the longshoremen. All alumina ore arriving in vessels at Longview was being discharged at the Port of Longview dock when the "Memorandum of Understanding" was negotiated. The longshoremen already had exclusive right to the work at this dock pursuant to a collective bargaining agreement with the Port of Longview. There was no reason for Local 21 to have agreed to the onerous changes proposed by Reynolds in hours,

manning and working conditions unless the longshoremen were to receive a *quid pro quo*. That *quid pro quo* was a commitment for work at the plant dock.

The District Judge who heard the evidence in this case knew what he was doing and made findings and conclusions which were not only warranted, but almost required by the evidence before him. The Court of Appeals, while paying proper deference to the "clearly erroneous" rule, retried the case *de novo* to find for the defendant.

CONCLUSION

For reasons set forth in this Petition, the Court should accept certiorari, reverse the judgment of the Court of Appeals, and reinstate the judgment of the District Court.

Respectfully submitted,

FRANK POZZI
RAYMOND J. CONBOY
Attorneys for Petitioner,
Local 21, International
Longshoremen's &
Warehousemen's Union

APPENDIX A

Office of the Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building
7th & Mission, P. O. Box 517
San Francisco, California 91101

Re: No. 71-1781 INTERNATIONAL LONGSHOREMEN'S & WHSEMENS UNION, LOCAL 21 vs. REYNOLDS METALS COMPANY

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 11-9-73 reversing the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

_____, Clerk

U. S. Court of Appeals

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

International Longshoremen's & Warehousemen's Union, Local 21, *Plaintiff-Appellee*, v. Reynolds Metals Company, *Defendant-Appellant*. No. 71-1781

[November 9, 1973]

Appeal from the United States District Court for the District of Oregon

Before: CHAMBERS and TRASK, Circuit Judges, and CONTI,* District Judge.

This is a suit by labor union under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a) to enforce an alleged contract between plaintiff Union Local 21 and defendant Reynolds Metals Company.

At the oral argument before this court, counsel for appellant Reynolds Metals Company made a suggestion that the appeal was moot. This suggestion was based upon the fact that the Memorandum of Understanding between Reynolds Metals Company (appellant) and I.L.W.U., Local 21 (appellee), dated November 25, 1966, upon which this lawsuit is based,

* Honorable Samuel Conti, United States District Judge, Northern District of California, sitting by designation.

was incorporated into the Working Agreement between the Port of Longview and the I.L.W.U., Local 21.

That latter Working Agreement expired by its terms on July 1, 1971. The District Court entered a stay pending appeal, and the Working Agreement, incorporating the Memorandum of Understanding, expired on July 1, 1971. The automatic renewal provision contained in the Working Agreement does not have any force and effect pending this appeal because by its terms it was not applicable. That provision states:

> "Section VIII. This agreement shall become effective this 6th day of June, 1967, and shall terminate on July 1, 1971, and shall be subject to reviews as set forth in the Pacific Coast Longshoremen's and Clerks' Agreements. *This agreement shall be considered renewed from year to year thereafter unless either party shall have given written notice of its desire to modify or terminate this agreement at least sixty days prior to expiration date . . .*" (Emphasis added)

Appellee itself argues that it gave such timely notice of its desire to modify the agreement.

Therefore, because of the expiration of the Memorandum of Understanding and the Working Agreement on July 1, 1971, the case has become moot.

Although this court has held for appellant Reynolds on the issue of mootness, it is also the opinion of this court that appellant should also prevail on the

merits of the appeal for the reasons contained in the remainder of this opinion.

The factual background of this dispute is that Reynolds Metals ("The Company") has an aluminum reduction plant at Longview, Oregon. The plant converts a powder like substance called alumina into aluminum ingots.

Since 1963 the unloading of alumina was covered by a contract between the Port of Longview (the "Port") and plaintiff Longshoremen's Local 21 (the "Union"). The Company had an agreement with the Port under which the Port performed all longshoremen's work on a cost plus basis. This work was performed at the Port of Longview's dock (the "Port Dock").

In 1965 the Company was considering building its own dock to handle more alumina. (Hereinafter the "Company Dock"). This Company Dock would only handle "self-unloading" vessels. The Port Dock handled mostly "crane-unloading" vessels and a few "self-unloading" ones.

In 1966 the Company was dissatisfied with the longshoremen's performance at the Port Dock and negotiations were entered into with the Union in which certain changes were discussed. In particular, these changes involved work hours for the various shifts and the establishing of a pool of crane operators.

On October 31, 1966, an "Understanding" was reached. Both sides agree that this understanding did

not purport to cover the issue of who would do the longshoremen's work at the proposed Company Dock. The Union had sought to inject this issue into the negotiations but the Company had refused to discuss it. The Union membership refused to ratify this agreement because it did not cover the issue of the work at the proposed Company Dock.

Subsequent negotiations in November 1966 smoothed out some issues in regard to working hours. In addition, a "T-Manning" provision was included. This type of provision gives the Company the right to immediately put in a new system of manning if new procedures are utilized, subject to grievance procedures by the Union. That "T-Manning" provision provided:

"C. *Manning Scales*

1. *Crane Type Vessels*

One Hatch Boss for overall operations.

Two Crane Operators per unit, who shall relieve each other. (The operator on relief shall act as hatch tender when necessary.)

Four Swing Men, two of whom may be used as shovelers.

Bulldozer or payleader operators, two per machine and shovelers may be added to the appropriate shift as needed.

2. *Self Unloading Type Vessels* (Subject to the 'T' Manning provisions as set forth in the M & M Sections 10.3(b), 10.4 and

15.2 of the Pacific Coast Longshore Agreement.)

One Hatch Boss for overall operations.

Five swingmen.

Basic longshoremen may be added as needed at the employer's discretion."

This "Memorandum of Understanding" was signed by the Union and the Company on November 25, 1966, and was later included verbatim in 1967 in the four-year Working Agreement between the Port and the Union.

In June of 1967 the Company's engineers completed a study re the feasibility of the proposed Company Dock as compared to further development at the Port of Longview (the "Port Dock"). It was decided to build a new dock and work was started in October, 1967. Fire delayed construction and the dock started to operate in September, 1969. In the interim the Company planned to assign work at the dock to the Aluminum Workers International Union, Local 305. The ship's crews did the dockside portion. The ships are all "self-loading." "Crane unloading" ships still unload at the Port Dock where the plaintiff Union does the longshore work.

The Union complained in 1969 that the Memorandum of Understanding of November 25, 1966, controlled the work and assigned it to Local 21. The Company denied this, and the Union brought suit.

The trial court held that a contract existed under

Section 301(a) and held for the Union on the interpretation of that contract. In particular the court held that the Memorandum of Understanding entered into on November 25, 1966, was a collective bargaining agreement. It further held that the agreement granted to the Union exclusive jurisdiction of loading and discharging aluminum ore vessels at the Port of Longview, including those that load at the dock facility constructed by the defendant Company adjacent to its Longview Aluminum reduction plant.

The Company appealed, arguing that the November 25, 1966 agreement is not a collective bargaining agreement, and, in any case, that it did not provide for exclusive jurisdiction by the Union over the loading at the proposed Company dock.

It is the opinion of this court that there is no mention of the provision re the Company Dock work assignment in the contract at all. All provisions of the Memorandum of November 25, 1966, relate to the Port Dock.

The Union argued in the trial (and on appeal) that the "T-Manning" provision discussed above could only be applicable to the proposed Company Dock with its self-loading capabilities because it was the only dock capable of handling a "new method of operation" as contemplated by the T-Manning provision. Thus, the Memorandum applied to the proposed Company Dock. (However, the Union conceded on cross-examination that the Port's facilities might be reconstructed to admit "self-loading" ships.) (Tr. p. 72-73). The Com-

pany, of course, argued that the T-Manning procedures could be used if the new dock was not built and the old dock was modernized to handle "self-loaders."

In addition, the Company argues that even if the Memorandum were construed to include the proposed Company Dock, it contained no promise of employing Local Union 21 to exclusively handle the longshoremen's work. A study of the Memorandum itself supports this argument.

In addition, the history of negotiations leading up to the Memorandum shows no intent to grant exclusive jurisdiction over the work to the Union.

The Company adamantly refused to discuss this issue up to the time of the October 31, 1966, agreement. The Union only insisted that wage and manning provisions (which were already in existence) be inserted to make the Memorandum look like a collective bargaining agreement. A new dock, or jurisdiction over work at the new dock, was not mentioned. Company officials had no intent or authority to include such an issue in the Memorandum. The Company never agreed to this issue. In fact, the Union representative, Mr. Van Brunt, testified that the issue was never covered in plain language "because we were not able, at the time of discussion, to get the company to agree to put it in that manner." (Tr. p. 77). In summary, there is no creditable explanation in the record of how the Company's previously adamant stand was changed.

With regard to the Findings made by the District

Court, they were clearly erroneous. One cannot look at the Memorandum and hold that the parties actually agreed that the work at the proposed Company Dock would be carried out by Local 21. F.R.C.P. 52(a).

Therefore, even if the case had not been rendered moot, this court must find for appellant on the merits and order that the decision of the District Court be reversed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

International Longshoremen's & Warehousemen's Union, Local 21,	)	Civil No. 69-701
Plaintiff	)	ORDER ALLOWING STAY OF JUDGMENT DURING APPEAL
vs.	)	
Reynolds Metals Company,	)	
Defendant	)	

Defendant's Motion For Stay During Appeal is granted, and the judgment entered in this case on April 7, 1971 is stayed while defendant's appeal from said judgment is pending; provided, that notwithstanding this stay, the provisions of the Memorandum of Understanding shall remain in effect as applied to the unloading of defendant's alumina vessels and the loading of hopper cars at the dock facilities of the Port of Longview, until the expiration of the Memorandum of Understanding.

Dated this 16th day of April, 1971.

ALFRED T. GOODWIN
Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

International Longshoremen's & Warehousemen's Union, Local 21	)	
Plaintiff	)	Civil No. 69-701
vs.	)	
Reynolds Metals Company,	)	JUDGMENT
Defendant	)	

This matter came on for hearing before the undersigned Judge of the Court on December 7 and 8, 1970. Plaintiff appeared by Frank Pozzi of its attorneys and defendant appeared by Allen Hart of its attorneys. The Court heard evidence, examined exhibits, and considered the arguments and memoranda of the parties. The Court's Findings of Facts and Conclusions of Law are embodied in an Opinion signed and filed on February 16, 1971. Based upon those Findings and Conclusions,

IT IS HEREBY ADJUDGED that the "Memorandum of Understanding" entered into between plaintiff and defendant on November 25, 1966, is a collective bargaining contract by the terms of which plaintiff and its members are granted exclusive jurisdiction over loading and discharging all of defendant's alumina ore vessels within the Port of Longview, including all such vessels that load and unload at the dock facility constructed by defendant; and not entitled to damages for defendant's breach of contract in failing to assign the work of loading or dis-

charging alumina ore vessels to the date of this judg-

IT IS FURTHER ADJUDGED that plaintiff is ment; however, plaintiff and plaintiff's members shall be entitled to damages for future violations.

DATED this 7th day of April, 1971.

Alfred T. Goodwin
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

International Longshoremen's & Warehousemen's Union, Local 21, Plaintiff	)	Civil No. 69-701
vs.	)	
Reynolds Metals Company, Defendant	)	OPINION

Pozzi, Wilson & Atchison
Frank Pozzi
John J. Haugh
808 Standard Plaza
Portland, Oregon 97204
Attorneys for Plaintiff

Lindsay, Nahstoll, Hart, Duncan, Dafoe & Krause
Allan Hart
9th Floor, Loyalty Building
Portland, Oregon 97204
Attorneys for Defendant

GOODWIN, Judge:

This is an action for declaratory relief and damages pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Labor-Management Relations Act, 29 U.S.C. § 185(a).

The plaintiff labor organization contends that the defendant corporation has breached a collective-bargaining agreement concerning the unloading of vessels at the defendant's dock in Longview, Washington. Plaintiff also seeks damages and attorneys' fees.

The parties have agreed to certain facts:

Reynolds Metals Company engages in the manufacture of aluminum ingots at its plant in Longview, Washington. Reynolds regularly receives at Longview alumina ore delivered by ocean-going vessels and by rail cars. Reynolds is an employer in and affecting commerce within the meaning of 29 U.S.C. § 185.

Prior to September of 1969, all ore vessels bringing alumina to Reynolds discharged their cargoes on the public dock operated by the Port of Longview. Unloading was performed exclusively by longshoremen members of the International Longshoremen's & Warehousemen's Union, Local 21.

Most of defendant's alumina ships unloading at the Port's dock have been "crane-type vessels," on which cranes are used for unloading cargo. However, until September, 1969, defendant occasionally brought a cargo of alumina to the Port's dock in "self-unloading type vessels," specially constructed with conveyor belts for unloading the alumina.

At all relevant times the Port of Longview has had a collective-bargaining agreement with plaintiff governing the Port's employment of longshoremen for stevedoring work performed by the Port at the Port's dock.

In the fall of 1966, plaintiff through its labor relations committee learned that Reynolds desired continuous twenty-four-hour unloading of Reynolds' alumina ships at the Port's dock and other changes in

working conditions in order to reduce unloading time.

On November 25, 1966, plaintiff and Reynolds entered into a "Memorandum of Understanding," and on June 6, 1967, the Port of Longview and plaintiff executed a "Working Agreement" which by its terms was to be effective until 1971. The "Memorandum of Understanding" dated November 25, 1966, is incorporated in the "Working Agreement" dated June 6, 1967.

In September of 1969, Reynolds completed construction of a dock facility at its plant in Longview. The Reynolds dock is equipped for unloading alumina from conveyor-type self-unloading vessels, but is not equipped for the unloading of crane-type vessels. Since September, 1969, conveyor-type vessels have been unloaded at Reynolds' dock facility, but Reynolds has used its own workmen rather than members of the plaintiff local.

Plaintiff contends that the "Memorandum of Understanding" of November 25, 1966, is a collective-bargaining contract by the terms of which the plaintiff and its members were granted exclusive jurisdiction over unloading all of Reynolds' alumina ore vessels within the Port of Longview, including all such vessels that would unload at the new dock facility then being planned by Reynolds. Reynolds contends that the "Memorandum of Understanding" is not a collective-bargaining agreement.

The principal issue arises out of Reynolds' contention that even if the memorandum should be con-

strued as a bargaining agreement, it does not grant to the plaintiff local the exclusive right to unload ships on Reynolds' own docks. Reynolds asserts the right to assign work on its own docks to its own employees, contending that the agreement with the plaintiff local applies only to port facilities owned and operated by the Port of Longview.

I have concluded, from the testimony of the witnesses and from the documents in evidence, that Reynolds did enter into a binding agreement with Local 21, giving the local exclusive jurisdiction over the unloading of all Reynolds vessels coming to the Port of Longview, including those that would discharge their cargoes at the dock facility to be constructed and owned by Reynolds.

The "Memorandum of Understanding" contained substantial benefits for both Local 21 and Reynolds. Local 21 desired exclusive jurisdiction of all of Reynolds' work on the Longview waterfront, whether on Port of Longview facilities or on Reynolds-owned facilities. Reynolds desired time-and-money-saving changes in work rules.

Reynolds now contends that the agreement was not intended to cover Reynolds' own dock. But I find that the plaintiff local would never have ratified the agreement without the understanding that it would apply to Reynolds-owned docks as well as to Port-owned docks.

Unless the agreement applied to Reynolds-owned

docks, the agreement would have given Local 21 nothing of importance that it did not have without the agreement. Local 21 gave Reynolds major concessions in work rules, and the most reasonable explanation for these concessions is that the Local received in exchange the right to work additional vessels.

The agreement is ambiguous with reference to the intentions of Reynolds. Reynolds points out that there was no express language giving Local 21 the work on the company-owned dock, and argues that no such agreement can be implied.

The top management of Reynolds may not have intended to enter into such an agreement, but the agreement was negotiated by an agent of Reynolds. If the agent did not have power to bind the company, Reynolds was not bargaining in good faith. Reynolds accepted favorable changes in work rules without question.

The most reasonable construction of the agreement in the light of the evidence surrounding its negotiation and execution reveals the intent to give the Local all the unloading work on the Longview waterfront in exchange for changes which Reynolds desired in work rules.

Accordingly, I find that the contract assigned to the members of Local 21 the unloading work here in controversy, and that the contract was in full force and effect in September, 1969, when operations at the Reynolds dock were commenced.

It follows that the plaintiff local is entitled to specific enforcement of the agreement. It is not equally clear, however, that Local 21 is entitled to damages for the breach. The uncertainty in the agreement could have been avoided by the Local by the use of reasonable clarity in drafting the agreement. The parties have been unable to agree upon the meaning of their agreement, and this court has had difficulty in deciphering its meaning. It would be inequitable to allow substantial damages to the party whose choice of language caused the difficulty. Whether the choice of language was intentional or the result of carelessness, Local 21 is entitled to no damages.

The foregoing opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). The plaintiff's attorneys will prepare and submit a form of judgment consistent with this opinion.

DATED this 16th day of February, 1971.

Alfred T. Goodwin

United States District Judge

APPENDIX F

November 25, 1966

MEMORANDUM OF UNDERSTANDING
Between
REYNOLDS METALS COMPANY
MARINE DIVISION
and
I.L.W.U. LOCAL 21

A. It being understood and agreed that Reynolds Metals Company shall make every effort to correct the electrical and mechanical problems of their vessels' cranes. The Union shall schedule a continuous twenty-four (24) hour operation. This would be accomplished by having a three shift, back-to-back operation. (By back-to-back operation, it is meant that one shift shall relieve the other and one-half the men shall relieve the other half for both coffee breaks and meal hours).

The Alumina operation shall be a board operation in order to insure a twenty-four (24) hour operation.

Reynolds Metals Company agrees to train and maintain a list of 27 qualified crane operators, and the Union agrees to furnish the number of crane operators required for all discharge operations from the qualified list. Such crane operators shall be trained in accordance with Sections 9.2, 9.4 and 9.41 of Pacific Coast Longshore Agreement.

B. *Hours, Vessels Only*

Day Shift	8:00 A.M. to 5:00 P.M.
Night Shift	5:00 P.M. to 2:00 A.M.
Third Shift	2:00 A.M. to 8:00 A.M.

The Day Shift of 9 hours to be 6 hours at the straight time rate and 3 hours at the overtime rate. The Night Shift to be 9 hours at the over-time rate. The Third Shift to be 5 hours at the 1.8 time straight time rate and the 6th hour at 1½ times the 1.8 overtime rate.

Late initial starts shall be allowed at 9:00 A.M. on the day shift and at 6:00 P.M. on the night shift but there shall be no late initial starts on the third shift.

When the initial start is either the day or second shift, then the second shift shall start at 6:00 P.M. and shall receive eight (8) hours pay and shall return on subsequent shifts at 5:00 P.M.

C. *Manning Scales*

1. *Crane Type Vessels*

One Hatch Boss for overall operations.

Two Crane Operators per unit, who shall relieve each other. (The operator on relief shall act as hatch tender when necessary.)

Four Swing Men, two of whom may be used as shovelers.

Bulldozer or payleader operators, two per machine

and shovelers may be added to the appropriate shift as needed.

2. *Self Unloading Type Vessels* (Subject to the "T" Manning provisions as set forth in the M & M Sections 10.3(b), 10.4 and 15.2 of the Pacific Coast Longshore Agreement).

One Hatch Boss for overall operations.

Five swingmen.

Basic longshoremen may be added as needed at the employer's discretion.

3. *Car Loading*

The basic crew shall be three men consisting of one foreman who shall be assigned regularly to the job, and two hopper men who shall be paid basic skill.

The foreman shall be on a 40 hour week, Monday through Friday, excluding holidays, and on a 6 and 2 basis.

The Alumina car gang shall be allowed to set the hoppers and belts on the dock prior to the arrival of a vessel if they do not have to work before or after their normal eight hour shift to do so.

D. *Wages*

Wages shall be as set forth in the Pacific Coast Longshoree Agreement plus the following:

	Skill	Dust Penalty
Crane Operator	40c	10c
Bulldozer Operator	30c	10c
Basic Skill	15c	10c
Hatch Boss	20c	10c
Car Foreman	45c	10c
Swing Foreman	15c	10c
Valve Men	15c	10c
All Others	---	10c

Shoveling penalty of 20c per hour shall be paid only to those men actually shoveling during the time of such activity.

E. It is agreed that this agreement shall also become a part of the agreement between the I.L.W.U. Local 21 and the Port of Longview who actually performs the work for Reynolds Metals Company.

Dated November 25, 1966

FOR REYNOLDS METALS COMPANY:

/s/ Peter F. Johnson
P. F. JOHNSON
Port Captain for
Reynolds Metals Company
Marine Division

FOR PORT OF LONGVIEW:

/s/ Harvey Hart
H. H. HART
Port Manager
Port of Longview

FOR ILWU - LOCAL 21:

/s/ *D. W. Van Brunt*
D. W. VAN BRUNT,
Chairman
/s/ *Merle L. Grogan*
MERLE GROGAN
/s/ *Leo A. Coulombe*
LEO A. COULOMBE
Labor Relations Committee
of I.L.W.U. — Local 21

Supreme Court, U.S.
FILED
APR 29 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1497

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 21,
Petitioner,

v.

REYNOLDS METALS COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALLAN HART
The Carriage House
1331 S. W. Broadway
Portland, Oregon 97201
Attorney for Respondent

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-74

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1497

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 21,
Petitioner,

v.

REYNOLDS METALS COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARGUMENT IN OPPOSITION

The only question litigated in this case in the courts below was whether, as claimed by the petitioner Union, the Memorandum of Understanding signed on November 25, 1966 by respondent Reynolds Metals Company, by petitioner, and by the Port of Longview,* contained a promise by Reynolds to em-

* The Memorandum is reprinted as Appendix F to petitioner's petition herein.

ploy longshoremen for unloading alumina from Company-owned vessels at a proposed Company dock, when and if this dock was built. Reynolds contended that the Memorandum did not apply to the proposed Company dock, and instead was concerned only with the manning, the shifts, and other work details for the unloading of alumina at an *existing* Port of Longview dock, where the Port, as an independent-contractor stevedore for Reynolds, employed longshoremen to unload alumina from the Company's vessels.

As stated above, the Memorandum was signed on November 25, 1966. During 1967 the Company decided to build its proposed dock, and began the construction work. In 1968, when the dock was nearing completion, the Company assigned the disputed unloading work to Local 305 of the Aluminum Workers International, the certified collective bargaining representative for most of the workers at the Company's Longview aluminum reduction plant. Later in 1968 a fire damaged the dock, so it did not become operational until a year later. The first vessel arrived at the dock in September 1969. Local 21 then claimed the unloading work for its members, relying on the Memorandum. The Company disagreed, and this suit followed.

The District Court held for petitioner, construing the Memorandum as a collective bargaining agreement in which Reynolds had granted to Local 21 and its members exclusive jurisdiction over discharging alumina from the Company's vessels at the Company's proposed dock facility. The District Court made no

findings of any underlying facts allegedly supporting its conclusion, other than a finding that unless the Memorandum gave Local 21 the disputed unloading work, the Union got "nothing of importance" in return for the concessions it granted to Reynolds. (The District Court's opinion and judgment are reprinted as Appendices D and E to petitioner's petition herein.)

In reversing, the Court of Appeals found that the case had become moot, because the Memorandum had expired while the appeal was pending. But the Court of Appeals was also of the opinion that the District Court's decision was wrong on the merits. The Court examined the text of the Memorandum and reviewed the evidence describing its negotiation and drafting, and held that the agreement was concerned solely with the unloading work at the existing Port's dock. The Court further held that the Memorandum did not contain a promise by Reynolds to employ members of Local 21 at the Company's proposed dock, that the history of the negotiations leading up to the Memorandum showed no intent to give Local 21 exclusive jurisdiction over this unloading work, and that the District Court's findings to the contrary were clearly erroneous. (The opinion of the Court of Appeals is reprinted as Appendix B to petitioner's petition.)

1. The case was correctly decided in the court below.

The decision of the Court of Appeals is clearly correct on the merits. The Memorandum does not ex-

pressly mention or in any way refer to the Company's proposed dock, or to the unloading work at this dock. Petitioner's contention is that a so-called T Manning provision included in the Memorandum for "self-unloader" alumina vessels was intended to imply a promise by Reynolds to employ longshoremen at the Company's proposed dock. As the Court of Appeals pointed out, however, the Union's principal witness conceded on cross-examination that, as of 1966, the T Manning provision might have been deemed appropriate and useful for application to the unloading of self-unloader vessels at the Port's dock. Therefore the inclusion of this provision in the Memorandum, by itself, does not compel the inference claimed by petitioner.

A district court's findings are "clearly erroneous" if on the entire evidence the reviewing court is left with the definite and firm conviction that a mistake has been committed. *United States* v. *United States Gypsum Company*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948). In the Ninth Circuit, a district court's findings are protected from review by Rule 52(a) only if they afford a clear understanding of the ground on which the court based its judgment. *Fluor Corp.* v. *United States ex rel Mosher Steel Co.*, 405 F.2d 823 (C.A. 9, 1969). As measured by these tests, the District Court's findings in this case were clearly erroneous.

The decision of the Court of Appeals that the case is moot was also correct.

The Memorandum was not itself an integrated and complete contract, and does not contain a statement of its intended term or expiration date. But the Memorandum was designed to be incorporated into a new four-year Working Agreement between Local 21 and the Port. This Working Agreement was executed on June 6, 1967, and the Memorandum was in fact included therein verbatim. In these circumstances the Court of Appeals correctly concluded that the Memorandum was governed by the expiration provisions of the Working Agreement, under which the Working Agreement was to expire on July 1, 1971, but was to be considered renewed from year to year thereafter

> ". . . unless either party shall have given written notice of its desire to modify or terminate this agreement at least sixty days prior to expiration date."

As the Court of Appeals pointed out, Local 21, in the correspondence quoted at pages 19-21 of petitioner's petition herein, gave Reynolds timely notice of its desire to modify the Memorandum, thus precluding its automatic renewal and requiring its termination on July 1, 1971.

Petitioner contends that the Company was nevertheless obligated by Seections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. §§ 158 (a) 5 and 158(d), to bargain with it for a renewal of the Memorandum, when and if the District Court's judgment was reversed (Petition, p. 24 ff). This contention is without merit.

Reynolds was not an employer of petitioner's members. If Reynolds in 1966 had promised Local 21 that it would employ longshoremen, instead of the plant workers represented by Local 305 of the Aluminum Workers, for the unloading work at the Company's proposed dock, this would have been in the nature of a "prehire" or "sweetheart" contract, contrary to Section 8(a)(2) of the National Labor Relations Act (29 U.S.C. § 158(a)(2). Cf. *International Ladies' Garment Workers Union* v. *National Labor Relations Board*, 366 U.S. 731, 81 S. Ct. 1603, 6 L. Ed. 2d 762 (1961). Reynolds was not under a statutory duty to bargain for the renewal of such a contract.

Finally, the action of the Court of Appeals in reversing the judgment of the District Court on the merits after holding that the case was moot did not prejudice petitioner. Petitioner contends that this was inconsistent with *Local No. 8-6, Chemical & Atomic Workers International Union, AFL-CIO* v. *Missouri*, 361 U.S. 363, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960). But the *Local 8-6* case did not hold that an appellate court may never rule on the merits after a holding of mootness. Cf. *Wirtz* v. *Local Unions* 410, 410A, 410B *and* 410C, 366 F.2d 438 (C.A. 2, 1966) By going beyond its finding of mootness and holding that petitioner did not have the rights it claimed under the expired Memorandum, the Court of Appeals made it clear that petitioner lost nothing, so far as this litigation is concerned, when the Memorandum expired.

2. Issuance of the writ is not warranted under this Court's Rule 19(b).

The Memorandum of Understanding at issue here is a unique agreement, in no way resembling conventional collective bargaining agreements. Its proper construction is of no interest to, and can have no effect on, anyone other than the parties thereto.

The importance of the Memorandum even for the parties is questionable. Even if the Memorandum were given the meaning adopted by the District Court, any attempt by petitioner under its terms to claim the unloading work now assigned to the Aluminum Workers presumably would have to be litigated before the National Labor Relations Board pursuant to 29 U.S.C. § 160(k).

This case does not involve any important questions of state or federal law, either as to the general rules for construing contracts, or specifically as to the interpretation and effect of collective bargaining agreements. What is presented instead is a decision on a fact question, that is, the meaning of the Memorandum of Understanding; and this question depends solely on the specific terms of the Memorandum and the circumstances in which it was negotiated and drafted. A ruling by this Court construing the Memorandum would have no value as a precedent in developing the law applicable to collective bargaining agreements.

For the reasons stated above, the action of the Court of Appeals in ruling on the merits after its

holding of mootness, does not warrant issuance of the writ, despite the *Local 8-6* case, because a reversal on this ground would gain nothing for petitioner.

CONCLUSION

We respectfully contend that no grounds exist for granting certiorari, and petitioner's petition should be denied.

Respectfully submitted,

ALLAN HART
Attorney for Respondent
Reynolds Metals Company